UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
RICK ALAN VAN DUSEN and	)	CASE NO. 03-32222 HCD
SUSAN KAY VAN DUSEN,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
ALLEGRA NETWORK, LLC,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 03-3106
	)	
RICK ALAN VAN DUSEN and	)	
SUSAN KAY VAN DUSEN,	)	
DEFENDANTS.	)	

Appearances:

Andrea Kurek Slagh, Esq., attorney for plaintiff, Hahn, Walz and Knepp, 509 West Washington Avenue, South Bend, Indiana 46601-1527;

Thomas M. Walz, Esq., attorney for plaintiff, Hahn, Walz and Knepp, 509 West Washington Avenue, South Bend, Indiana 46601-1527; and

Jacqueline S. Homann, Esq., attorney for defendants, 202 South Michigan Street, 600 Key Bank Building, P.O. Box 4577, South Bend, Indiana 466634-4577.

MEMORANDUM OF DECISION

At South Bend, Indiana, on February 9, 2005.

Before the court is the Complaint and Objection to Discharge filed on July 18, 2003, by Allegra Network, LLC ("Allegra" or "creditor"), creditor of the debtors Rick Alan Van Dusen and Susan Kay Van Dusen ("Van Dusens" or "debtors"). The creditor objected to the debtors' discharge, pursuant to 11 U.S.C. § 727(a)(2), and asked that its judgment debt be excepted from the debtors' discharge pursuant to 11 U.S.C. § 523(a)(6). Trial on the complaint was held on August 24, 2004, and the matter was taken under advisement. For the reasons that follow, the court now grants Allegra's Complaint and Objection to Discharge.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I), (J) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

Allegra is a franchisor of printing and copy centers. Rizzo, Inc. ("Rizzo"), an Indiana corporation doing business as Allegra Print & Imaging Center, was its franchisee in Goshen, Indiana. It was owned by Rick and Susan Van Dusen. Allegra and the Van Dusens entered into a franchise agreement on June 8, 1998. The agreement required them to pay royalties and other sums to Allegra. When they did not make the payments, Allegra filed a lawsuit in the United States District Court for the Eastern District of Michigan, seeking damages and injunctive relief for breach of contract and trademark infringement. The litigation was submitted to arbitration in accordance with the franchise agreement provisions. On February 13, 2002, the Arbitrator of the American Arbitration Association Commercial Arbitration Tribunal issued a detailed, comprehensive Memorandum Opinion and Award granting Allegra's monetary claim of $124,193.09, plus administrative fees and expenses. It ordered the Van Dusens and Rizzo, jointly and severally, to pay Allegra that sum.[1] *See* Pl. Ex. 1.

[1] The Arbitrator's Memorandum Opinion and Award determined that the franchise had remained in effect until its termination on January 11, 2002, and that the Van Dusens and Rizzo were liable for unpaid royalties, national advertising fund payments, and interest accruing on sales made through that date. They were also liable for Allegra's legal fees and past non-sufficient fund charges. In addition, they were "directed and enjoined to permanently cease identifying themselves or their business as a current or former Allegra Print and Imaging (continued...)

On April 23, 2002, the United States District Court for the Eastern District of Michigan held a hearing and confirmed the arbitration award. *See id.* It then entered a Judgment "in favor of Plaintiff Allegra Network, LLC and against Defendants Rizzo, Inc., Rick A. Van Dusen and Susan K. Van Dusen, jointly and severally, in the principal sum of $125,255.61, together with accrued interest." Pl. Ex. 2.

At the time the judgment was entered, Rick and Susan Van Dusen were Rizzo's only directors, officers and shareholders. Rizzo was administratively dissolved on August 21, 2000, and the franchise agreement was terminated on January 11, 2002. Rizzo continued doing business, however, until the end of 2002. On December 12, 2002, Nyal J. Weaver, father of Susan Van Dusen and father-in-law of Rick Van Dusen, incorporated Paragon Printing Center, Inc. ("Paragon") and listed himself as its sole director, officer and shareholder. On January 3 and February 4, 2003, the Van Dusens transferred Rizzo assets to Paragon. They also became employees of Paragon in January 2003.

The Van Dusens filed a voluntary chapter 7 bankruptcy petition on April 18, 2003. Three months later, Allegra initiated this adversary proceeding against the debtors. In its complaint, Allegra alleged that the Van Dusens, as the directors, officers and shareholders of Rizzo, Inc., "regularly disregarded, controlled and manipulated the corporate formalities in conducting the business affairs of Rizzo, Inc." and "regularly treated the assets of Rizzo, Inc., as their personal property rather than as the assets of a corporation." R. 1 at 1. Count II of the complaint requested that the debt to Allegra be excepted from the debtors' discharge pursuant to 11 U.S.C. § 523(a)(6). The creditor alleged that the debtors' transfer of Rizzo property to Paragon impaired its rights, as a creditor, to collect on its judgment against Rizzo and the debtors. It noted that the transfers of property to Paragon, the newly established quick-print business of Susan Van Dusen's father, were not conducted in a regular manner and did not pay Rizzo a reasonably equivalent value for its assets through the transfers. According to the complaint, the debtors knew that the proceeds from the sale of Rizzo assets to Paragon should

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[1](...continued)
Center or from using any Allegra Print and Imaging mark in any manner or for any purpose." Pl. Ex. 1 at 20.

have been turned over to Allegra, in satisfaction of Allegra's judgment, but they were not. The creditor argued, therefore, that the transfer of Rizzo's assets to Paragon and the failure to transfer those proceeds from the sale of assets to Allegra were done in conscious disregard of the debtors' duty to Allegra and were done willfully, maliciously, and without justification or excuse. Because the debtors' conduct injured Allegra so that it could not collect on its judgment, it asked that the judgment debt be excepted from discharge. *See* R. 1 at 2-3.

In Count III of the complaint, Allegra asked that the debtors be denied a discharge under 11 U.S.C. § 727(a)(2). It contended that the Rizzo assets transferred to Paragon were personal assets of the debtors, not corporate assets of Rizzo. It asserted that the debtors did not receive a reasonably equivalent value for those assets from Paragon. It further alleged that the transfers, which rendered Rizzo insolvent, were conducted by the debtors with the actual intent to delay, hinder and defraud Allegra. Because those transfers impaired Allegra's rights to collect its judgment, Allegra prayed that the debtors be denied a discharge pursuant to § 727(a)(2) for transfers made with actual intent to delay, hinder and defraud the creditor. *See* R. 1 at 3-4.

In their Answer, the debtors denied the complaint's essential allegations and raised two affirmative defenses. *See* R. 10. They stated that the complaint failed to state a claim and that the Rizzo assets were transferred by the corporation, not by the debtors, and therefore could not be the basis for a denial of discharge. *See id.* at 3. In the parties' Pre-Trial Order, the defendants contended that the arbitrator's judgment rendered Rizzo and the Van Dusens insolvent. *See* R. 26 at 4. After the judgment was filed in Indiana, they pointed out, Allegra garnished Rizzo's bank accounts and outstanding accounts receivable to collect on its judgment. Rizzo wound up its affairs by December 2002. It liquidated its assets by selling them to Paragon for fair market value in the total amount of $6,056.32. It used those funds to pay its employees and various vendors of Rizzo, in accordance with its statutory duty and authority to wind up its affairs and liquidate its assets. *See id.*

After granting the parties' numerous requests for extensions of time for discovery and trial continuations, the court held a trial on the complaint on August 24, 2004. The plaintiff's first witness was Mark Crowley, Vice President of Allegra. He testified that Allegra franchises quick-print stores and that he, as Vice

President for Finance, is responsible for handling the company's financial matters. His duties include franchise compliance, billing and collection from franchisees. He explained that Allegra's predecessor had purchased franchise contracts from XYAN, and one of those contracts was with Rizzo, which was owned by the Van Dusens. Allegra entered into a franchise agreement with the Van Dusens personally, he said. They had a history of defaulting, however, and so Allegra brought suit against the Van Dusens in federal district court in Michigan. The case was referred to arbitration; both parties, represented by counsel, participated. The arbitrator awarded Allegra $124,193.09, plus administrative fees and expenses, to be paid by Rizzo and the Van Dusens within thirty days of the award. The United States District Court confirmed the award and issued a Judgment in favor of Allegra and against Rizzo and the Van Dusens, jointly and severally, in the sum of $125,255.61 plus accrued interest. *See* Pl. Exs. 1, 2. The parties stipulated to the fact that the arbitration award and judgments for Allegra were entered in Michigan and Indiana. Mr. Crowley then testified that, in Allegra's attempt to collect on its judgment, it held a creditor's examination of the Van Dusens and attempted to garnish bank accounts and to attach accounts receivable. However, only about $1,400 was collected, he stated.

The next witness was the debtor Rick Van Dusen. He testified that he was employed by Paragon, which is owned by his father-in-law, in January 2003. Before that, he said, he owned and operated Rizzo, a print shop like Paragon in the same location as Paragon. He admitted that, even though Rizzo was administratively dissolved on August 23, 2000, he continued to operate the printing business until December 2002. He also entered into a franchise agreement with Allegra during that time. He recognized that the arbitration award and subsequent judgment were entered against him and his wife, and he did not dispute them. Furthermore, he acknowledged that they were directed to appear in federal district court to disclose their individual and business assets in October 2002.

The debtor testified that, to collect on the judgment, Allegra had attached his accounts receivable and frozen his checking accounts. In compliance with the district court's order, he had reported Rizzo's and the Van Dusens' personal assets to the court. He disclosed their personal bank accounts (at MFB Bank), his business

accounts (at Lake City Bank), and all the accounts receivable and assets of the business. He conceded, however, that the Rizzo business checking account at Lake City Bank had been used to pay for his personal credit card bills to First USA Bank and Discover Card. *See* dep. at 37-39; Pl. Ex. 5 at 14. He also admitted at trial that some payments for a Mercedes Benz he and his wife personally owned were made through the business bank account. *See* Pl. Ex. 5 at 2, 4. He insisted, however, that the payments were for corporate, not individual, liabilities.

The debtor stated that he opened an account for Rizzo in the Farm Bureau Credit Union in September or October 2002, after Allegra froze the other accounts, to deposit the accounts receivable and to pay other creditors Rizzo owed. He admitted that he did not disclose that account to Allegra, but justified that decision by explaining that he opened the account after the district court had directed him to disclose his accounts. According to Van Dusen, the receivables deposited in the Farm Bureau account were not included on the list of receivables the court required him to turn over to Allegra. He added that, at the time they filed bankruptcy, he and his wife did not have a personal bank account; they paid all their bills with cash. For that reason, he did not list any personal bank accounts on his schedules. He also testified he paid small suppliers in January, February, and March 2003, after Rizzo was closed, but did not pay Allegra from the funds deposited in the Farm Bureau account. Although he knew that Allegra had a judgment against him, he stated, he chose to pay other creditors, some of which are the same vendors Paragon now uses. When asked whether he wanted Allegra to collect its judgment, he responded, "My answer would be no, I did not want them to collect all that money."

Van Dusen said that he had decided in December 2002 to file bankruptcy. After he closed Rizzo's doors at the end of December, he started working for Paragon, his father-in-law's new printing company, a week or so later, in January 2003. He does not remember discussing the possibility of working for Paragon with his father-in-law before Rizzo closed at the end of December 2002. He noted that Paragon is in the same location as Rizzo; it has the same employees (Jenny Tindall, his wife Susan Van Dusen, and himself) and basically the same suppliers and customers. In addition, Paragon offers the same quick prints and other services that Rizzo did. However, Rick Van Dusen does not have as many responsibilities at Paragon as he had at Rizzo: He is not

the general manager of Paragon, he stated, and does not run the day-to-day operations or supervise other employees there. He takes orders and ships the ordered goods, sets schedules, orders supplies, does data entries of orders, and keeps track of sales. He said that, in the end, he does not handle the books, but that everything else he does is basically the same as what he did at Rizzo. He said he turns over the books to Weaver, the owner. Van Dusen acknowledged, however, that Weaver is not at the business on a daily basis and sometimes is not there for weeks at a time.

The debtor testified that, after he closed Rizzo, his father-in-law talked to him about the Rizzo equipment and inventory. He sold it to Weaver rather than putting it up for sale or auction. Before Rick Van Dusen went to work for Paragon, Weaver knew about the Van Dusens' financial difficulties, the judgment against them, the frozen bank accounts, and the thought that bankruptcy was an option. The debtor sold Rizzo's inventory and furniture to Paragon for $406.82 in January 2003. *See* Pl. Ex. 7. The payment was deposited in the Farm Bureau Credit Union account and was not paid to Allegra. His father-in-law also bought the Rizzo equipment for his new business, paying $5,650.00. *See* Pl. Ex. 8. Van Dusen valued the equipment by checking the listings of similar equipment in national trade magazines. He circled the equipment and the value in the publications and gave them to Weaver. The payments also were deposited in the Rizzo account at Farm Bureau Credit Union in February 2003. Any other assets of Rizzo's simply were left at the same location, the one that Paragon then used for its business.

Van Dusen also testified that he filed bankruptcy on April, 18, 2003; it was he who provided the information found in the petition and schedules. He admitted that he stated on the Statement of Financial Affairs that the debtors each held a 50% partnership interest in the business and that they withdrew from the partnership in December 2002. *See* Pl. Ex. 4, ¶¶ 21, 22. However, at the hearing he testified that the statement was a mistake and that Rizzo was a corporation, not a partnership.

Van Dusen said that he knew Allegra was trying to collect its judgment. He admitted that, by February or March 2003, he already had decided to file bankruptcy, had got rid of the Rizzo inventory, furniture

and equipment, and had deposited the receivables for Rizzo in the Farm Bureau account. He knew that, if he had no property, Allegra would have no property from which to collect its judgment. He also stated that the funds in the Farm Bureau account were disbursed to local suppliers with whom he had done business for a long time, and not to Allegra.

On cross examination, the debtor testified that he learned of the administrative dissolution of Rizzo, Inc., at the district court hearing to identify the assets of the debtors and of Rizzo. He stated that he did not know before that time. He reiterated that Rizzo was a corporation, not a partnership, and emphasized that he was not listed personally on Rizzo's bank accounts. He stated that the payments from Rizzo's corporate banking account to Mercedes Benz were listed as a "payroll" to his wife and himself. He also suggested that the Rizzo account was used to pay his personal credit card because an item was purchased on that account for Rizzo. Concerning the Farm Bureau bank account, Van Dusen stated that he was not ordered to disclose those account assets. Moreover, he said, Allegra did not inquire about later accounts receivable, and so he did not divulge that information. Instead, he chose to pay the creditors in Goshen, because it is a small town and he felt obligated to pay them with the little bit of money he had received.

Van Dusen testified that, from the time the arbitration award was issued, he and his wife never had the means to pay it. At that time, Rizzo already was in financial difficulty; he said that sales were decreasing and that they could not meet their expenses. In addition, at the time of the judgment, both Rizzo and the Van Dusens personally had more liabilities than assets. He had to close the business, and he sold Rizzo's assets to Paragon for their fair market value, he believed. He also stated that the bankruptcy petition and schedules were not correct and that Rizzo was a corporation, not a partnership. He did not know why the schedules were marked as a partnership instead of corporation, he testified.

On redirect, he conceded that he closed Rizzo because it was not making money. He also stated that he knew he should have been paying Allegra but that he paid the small creditors instead.

Next to testify was the debtor Susan Van Dusen. She operated Rizzo with her husband. She was aware of the district court judgment against them and was aware that Allegra was trying to collect the debt. However, she was unable to remember the questions she was asked when she appeared at the November 2002 district court hearing about their individual and business assets. She stated that her husband handled all the bookkeeping for Rizzo and that she was not involved.

Susan Van Dusen testified that she began working at Paragon, her father's corporation, in January 2003, a week or so after Rizzo closed. She performs the same services she did at Rizzo: She takes care of customers, writes up orders, cleans the store, makes cold call sales, and visits different businesses to sell Paragon's products to them. She stated that her husband is not the general manager at Paragon and does not handle the day-to-day operations. His duties are the same as the ones he had at Rizzo, she said, except that he now sends information to the payroll department and does not do the bookkeeping.

She also testified that her father hired Jenny Tindall, the third employee who had worked at Rizzo, even though he did not know her. She acknowledged that many of the same customers came to the new store, because Paragon was in the same location as Rizzo. Perhaps many of the suppliers are the same, as well, although she was not sure because she does not do the ordering. She explained that Paragon offers more services than Rizzo did: They work more with e-mail and use new equipment to make larger posters and to bind documents in new ways now.

According to Susan Van Dusen, because of the judgment against them, she and her husband had thought about bankruptcy as an option in the spring or summer of 2002, but did not file until April 2003. She said they discussed bankruptcy shortly after the judgment was entered and, because of their financial situation, decided it was the only option. She also said that she did not discuss working at Paragon before she actually started there, but that it was her choice to work there.

The final witness at trial was Nyal J. Weaver, father of the debtor Susan Van Dusen. He knew that his daughter and son-in-law were the owners of Rizzo and that their printing business operated under a franchise,

first of Insta-Copy and then of Allegra. He understood that there was a lawsuit involving the franchise. Rizzo closed in November or early December 2002, he thought.

He testified that the Van Dusens had financial problems three or four years ago and asked him for money. He first heard it from their friends and neighbors, he said. They had to sell their home in 2000 or 2001, and wanted to build a new home but did not have the money. Around September 2002, they asked him to buy a lot that he had given them. They said that they had to file bankruptcy in August or September 2002. He did not loan money to them or to Rizzo, but he purchased two pieces of equipment – a collator and a book-maker – from them in 2000 or 2001. He explained that the debtors needed about $3,000 to repair a machine; rather than loan the money to them, he said, he bought the equipment. He did not need the equipment, he said, but he kept it as collateral and left it on the business premises for them to use. He received it back when he took out a one-year lease on the building in late December 2002.

Weaver testified at trial that he had no knowledge of the Van Dusens' problems with Allegra and was not apprised of the day-to-day operations of Rizzo. However, in his deposition, taken January 23, 2004, he stated that he knew there was a franchise problem three or four years ago. *See* Dep. of N. Weaver, p. 87. He reconsidered his statement at trial, therefore, and said that he knew there was a problem but did not know the nature of it and knew nothing of the details. When confronted with his deposition testimony, he testified that he knew that there were legal proceedings against the Van Dusens involving money and that they had to go to court. At first he stated that he did not know of any actions taken in the legal proceedings, but then acknowledged that he knew that all of their bank accounts were attached. He also was aware that Susan Van Dusen had asked her mother for money to pay a medical bill, but he was not sure if it occurred in early 2002.

Weaver stated that he incorporated Paragon Printing Center, Inc., on December 13, 2002, and that he is the sole shareholder, director and officer. He first contemplated incorporating the business on December 6, 2002, and he started setting up the business around December 23, 24, or 25 by cleaning the building and getting ready for the leased equipment to be delivered. He determined what equipment he needed by talking to his son-

in-law. He followed Rick Van Dusen's suggestion and leased equipment from Icon, an office supply place. He consulted with his son-in-law only about equipment, nothing else.

Weaver stated that he does not receive a wage on a periodic basis from Paragon. He spends 10-15 hours a week on Paragon business, of which 4-5 hours is spent on the premises. He officially opened the business in January 2003 with the three Rizzo employees and himself. He did not interview for employees; instead, he followed the advice of his daughter and son-in-law and hired the other Rizzo employee, Jenny Tindall. He explained that Rick Van Dusen handles the production, typesetting, layouts of jobs, and copy work, and that Jenny Tindall is his assistant. His son-in-law has nothing to do with payroll, he said, except to turn in the hours that each employee worked each week. When Weaver is not at the shop, Rick Van Dusen is in charge of production and Susan Van Dusen is in charge of sales, making calls, delivering product, and cleaning.

Weaver insisted that he did not have any conversations with Rick or Susan Van Dusen about starting Paragon before it was incorporated. In late December, after they closed their business, he told them that he was opening another business and asked them about equipment. He purchased Rizzo's inventory (paper and furniture) for $406.82. In order to purchase Rizzo's color printer, copier, collator, trimmer, press, and other machines from Rizzo, he determined the fair market value of the machinery by examining ads in Marketplace and other trade magazines he received at the store. *See* Pl. Ex. 9. He explained that his attorney suggested that he should establish the fair market value because the Van Dusens said they were going to file bankruptcy and because he was purchasing equipment from a closed company. After deciding on the fair market value for himself, he asked his son-in-law if he agreed that his valuation would be a fair price. He stated that, in the past, he had been a creditor in a bankruptcy and thought it was prudent to establish the fair market value of equipment so that the sale could not be voided later.

Weaver testified that his daughter solicited customers for Paragon by calling businesses and by knocking on doors. He said he did not take over any customers from Rizzo, as far as he knew. Weaver stated that he did not know much about the quick print business before he opened Paragon, but he decided to go into

the business because it was an opportunity to start a profitable business. Although he knew that Rick and Susan Van Dusen were having financial problems and had closed their business, he was not concerned that there was a risk in going into the same business in the same location with the same people working for him.

He denied that he formed Paragon to employ his daughter and son-in-law. In fact, he said, if he simply had wanted to give them jobs, he could have given them jobs in either of his other two businesses. He has been an entrepreneur since 1955, he stated, having started a number of different businesses – from the silkscreen printing business to one that rebuilt motor coaches. The two businesses still operating are Flame Tree, which makes soft goods, and Industrial Rental Properties. He hired his daughter and son-in-law because they were out of work and available and had knowledge of the business. However, he insisted that he was never involved in Rizzo and that the debtors never discussed it with him.

After counsel for the parties presented their closing arguments, the court took the complaint under advisement.

Discussion

In its complaint, Allegra asked that the judgment debt owed by the Van Dusens to Allegra be declared nondischargeable under 11 U.S.C. § 523(a)(6) and that the debtors be denied a discharge under 11 U.S.C. § 727(a)(2). The court begins by considering the more drastic remedy sought, the barring of the debtors' discharge. Section 727(a) requires the court to grant a debtor a discharge unless –

> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed – (A) property of the debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition.

11 U.S.C. § 727(a)(2). The party objecting to the discharge has the burden of proof. *See* Fed. R. Bankr. P. 4005. The standard of proof required is a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991); *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 966-67 (7th Cir. 1999).

The court can deny the debtors' discharge, therefore, if Allegra demonstrates the following elements of § 727(a)(2) by a preponderance of the evidence:

> (1) that the act complained of was done at a time subsequent to one year before the date of the filing of the petition; (2) with actual intent to hinder, delay or defraud a creditor . . . ; (3) that the act was that of the debtor or his duly authorized agent; (4) that the act consisted of transferring, removing, destroying or concealing any of the debtor's property, or permitting any of these acts to be done.

Village of San Jose v. McWilliams, 284 F.3d 785, 791 (7th Cir. 2002) (citation omitted); *see also In re Kontrick*, 295 F.3d 724, 736 (7th Cir. 2002), *aff'd.*, 540 U.S. 443, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004). The creditor must prove actual, not constructive, intent; however, it can establish the intent through circumstantial evidence. *See McWilliams*, 284 F.3d at 790; *In re Krehl*, 86 F.3d 737, 743 (7th Cir. 1996) ("Because direct evidence of a debtor's intent usually will be unavailable, it may be inferred from the circumstances surrounding his objectionable conduct.").

The court finds that the less-than-one-year time requirement has been met. The Michigan district court's Order and Judgment which established the underlying debt were issued less than a year before the Van Dusens filed their petition, and all the acts alleged by Allegra occurred between the date of the Judgment and the Van Dusens' bankruptcy filing.

The court also finds that the acts of transfer specifically alleged by Allegra were not challenged by the debtors. Rick Van Dusen freely admitted that he opened the new business bank account at the Farm Bureau Credit Union, without revealing it to Allegra or to the district court, and began depositing accounts receivable there. He also agreed that he arranged the sale and transfer of Rizzo assets to Weaver, Susan Van Dusen's father, so that Weaver could open his new quick-print business, Paragon. Rick Van Dusen admitted that he chose not to turn over the proceeds from that sale to Allegra but instead deposited the proceeds in the Farm Bureau account and paid other creditors. Finally, the debtors acknowledged that they filed a chapter 7 bankruptcy petition a few months after closing Rizzo.

Nevertheless, the debtors presented reasons for their actions that differed significantly from the reasons attributed by Allegra. Rick Van Dusen explained that, after the district court required the Van Dusens to report their personal and business assets, he needed a working bank account in order to continue conducting his business. He opened the Farm Bureau account, he said, to deposit Rizzo's accounts receivable and to make payments to local vendors and suppliers. Rick Van Dusen also testified that, in winding up Rizzo's business in December 2002, he sold the Rizzo assets to Nyal Weaver because Weaver was an entrepreneur who wanted to start a quick-print business and who took advantage of Rizzo's closing to purchase its equipment, furniture and inventory. The testimony of the witnesses suggested that it was Weaver's idea to hire the staff of Rizzo and to operate his new business, Paragon, in the same location as Rizzo with the same employees, equipment, suppliers, and customers, providing basically the same services, with the plan to expand upon those services over time. They further implied that it all simply fell into place and that there was no intent to harm Allegra. The debtors each testified, as well, that they did not contemplate working for Paragon until they actually started working there about a week after Rizzo was closed.[2]

In general, the debtors described their conduct in the year before they filed bankruptcy as activities intended at first to sustain their business and then, at the end of the year, to wind up their business. However, Rick Van Dusen did testify that he chose to pay the local suppliers with whom he had done business for years rather than to pay Allegra. In fact, he stated that he sold Rizzo's assets, deposited the checks from Paragon in the

[2] It strains the court's credulity to believe Weaver's testimony that, within a week of conceiving the idea and without any discussion with the Van Dusens, he incorporated a new quick-print business just as Rick and Susan Van Dusen were in the process of closing their quick-print business. Rick Van Dusen testified that Weaver asked about purchasing the Rizzo equipment only after Rizzo closed, and both debtors testified that they did not discuss working at Paragon before they actually started work there. The court finds that the witnesses gave remarkably similar answers to some questions and appeared to have rehearsed responses concerning the transfer of Rizzo's assets to Paragon and their unplanned employment at Paragon one week after Rizzo closed. In the view of the court, the witnesses' explanations of the termination of Rizzo and opening of Paragon one week later in the same location were not plausible or reasonable. The court finds that the transfer of Rizzo's assets to a family member's newly formed identical business was suspicious. It further finds that the debtors' demeanor reflected that they knew that their decision to use the Rizzo proceeds to pay other creditors and not Allegra was an act intended to frustrate Allegra's attempt to recover the judgment debt owed by the debtors.

Farm Bureau Credit Union account, and disbursed the funds to small creditors and not to Allegra. When asked at trial whether he wanted Allegra to collect its judgment, he responded, "My answer would be no, I did not want them to collect all that money." He said he knew that, if he had no property, Allegra would have no property from which to collect its judgment. The court therefore finds that Rick Van Dusen's testimony is direct evidence clearly demonstrating his actual intent to hinder, delay or defraud Allegra in its collection of the judgment debt owed to it by the debtors.[3] *See In re Kontrick*, 295 F.3d at 737 (affirming the bankruptcy court's finding that the debtor's statements were direct evidence of actual intent and that the debtor's deposits into a newly formed checking account were transfers of the debtor's property with the intent to hinder creditors by putting assets beyond the reach of the creditors).

The court concludes that Allegra has succeeded in its burden of proving § 727(a)(2) elements (1), the time requirement; (2), the intent requirement; and (4), the transfer of property requirement. The debtors insist, however, that Allegra has failed to prove the third criterion, "that the act was that of the debtor or his duly authorized agent." According to the debtors, the plaintiff failed to make the crucial distinction between the Van Dusens, as individuals who filed bankruptcy, and Rizzo, the corporation that closed its doors. They point out that the assets transferred to Paragon were the corporate assets of Rizzo, not of the Van Dusens, and that the debtors' liabilities were separate from Rizzo's. They contend that Rizzo properly wound up its business at the end of 2002. The Van Dusens transferred Rizzo's inventory and equipment, not their own. Because the debtors

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[3] Having found direct evidence of the debtor's intent to defraud, the court does not need to discuss the circumstantial evidence of fraudulent intent. It finds, however, that the close family relationship of the parties involved in the transfer of Rizzo's assets clearly is suggestive or indicative of an intent to defraud. Indeed, the court does not believe Weaver's testimony that he started Paragon in the same location as Rizzo, with the same employees, equipment, and services, simply because he was an entrepreneur seeing an opportunity to start a profitable business – and not because his daughter and son-in-law needed help. The court also points out that the cumulative effect of the debtors' course of conduct after they incurred the judgment debt reflects a determined intent to hinder and delay Allegra's collection of that debt. *See McWilliams*, 284 F.3d at 791 (listing factors indicating intent to defraud). In the view of the court, the debtors failed in their burden of refuting a presumption of an intent to defraud, for they were unable to demonstrate that the intent reflected in their conduct was not an intent to hinder, delay or defraud Allegra.

themselves did not recoup any of the proceeds or keep any of the property, they assert, Allegra has no evidence that they personally intended to hinder or defraud it.

In consideration of this argument, the court examined the record to determine Rizzo's status as a corporation. Rick Van Dusen testified that Rizzo was incorporated in October 1988 and was administratively dissolved on August 21, 2000. Although the record contains no documents or evidence that Rizzo was an Indiana corporation duly qualified to do business under the laws of the state of Indiana, the court presumes from the testimony that Rizzo, Inc., was incorporated and administratively dissolved in Indiana. The laws of Indiana therefore govern its existence and dissolution.

> [A] private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes.

Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp., 302 U.S. 120, 124-25, 58 S. Ct. 125, 126-27, 82 L.Ed. 147 (1937) (*quoted in In re Tri-Angle Distributors, Inc.*, 102 B.R. 151, 152 (Bankr. N.D. Ind. 1989)). In Indiana, an administratively dissolved corporation continues its corporate existence only to the extent necessary to liquidate its business. Ind. Code. § 23-1-46-2. In winding up its business, an administratively dissolved corporation may collect its assets, dispose of its properties, discharge its liabilities, and distribute its remaining property. *See* Ind. Code. § 23-1-45-5(a). It may also file a petition under chapter 7 of the Bankruptcy Code in order to liquidate its business and affairs. *See In re Tri-Angle Distributors*, 102 B.R. at 153.

The debtors did not inform the court of the grounds for the administrative dissolution. *See* Ind. Code § 23-1-46-1; § 23-15-6-5. Rick Van Dusen testified that he did not know that Rizzo was administratively dissolved until he was told at the October 2002 district court hearing. The court does not credit that testimony, however, and finds that the Van Dusens knew or should have known of the administrative dissolution. When the Indiana Secretary of State initiates proceedings to dissolve a corporation administratively, he or she serves the corporation with written notice of the determination and requires it to correct the grounds or to demonstrate that

the grounds do not exist. *See* Ind. Code § 23-1-46-2; *cf.* Ind. Code 23-1-18-10, Official Comments (describing administrative dissolution as "a time and cost-efficient means of bringing irregularities to the corporation's attention and providing it with an opportunity to remedy the situation"). If a corporation fails to respond within sixty days, as required, the Secretary signs and files a certificate of dissolution and serves a copy on the corporation. *See id.* Without evidence to the contrary, the court finds that Rizzo, Inc. was duly served and thus that Rick Van Dusen, its President, Director and 50% shareholder, was notified of the administrative dissolution of his company.

The statute provides that the administratively dissolved corporation "may not carry on any business except that necessary to wind up and liquidate its business and affairs . . . and notify claimants." Ind. Code § 23-1-46-2(c). Although no deadline is given for liquidating a business or for petitioning for reinstatement under Indiana Code § 23-1-46-3, the statute certainly limits the corporation's ability to function. Such a business should be terminated promptly, for it is no longer viable and at some point will be without corporate capacity. Under the statute, therefore, Rizzo was prohibited, after August 21, 2000, from doing any business except what was necessary to wrap up its business affairs and to liquidate. *Cf. United States v. SCA Servs. of Indiana, Inc.*, 837 F. Supp. 946, 953 (N.D. Ind. 1993) (stating that, under Indiana law, an administratively dissolved corporation may still be sued by creditors).

Despite its administrative dissolution, Rizzo continued to use its corporate name and to operate in the ordinary course of its business until the end of December 2002. It continued operating as a franchise of Allegra, apparently without giving notice of Rizzo's dissolved status as of August 2000. *See* R. 1, Award of Arbitrator, at 13 ("It is undisputed that since the termination of the Franchise Agreement on January 11, 2002, [the Van Dusens] have continued to operate a business at the location of their Allegra Print and Imaging Center in Goshen, Indiana and that the 'services are unchanged from Allegra,' the customers of the business are the same and the phone number is the same."). According to the testimony at trial, the Van Dusens began winding up and

liquidating only in the last two months of 2002, and the transfer of assets was not accomplished until January 3 and February 4, 2003.

The court finds that, from the date of administrative dissolution, August 21, 2000, Rizzo had no authority to do any business except liquidating and winding up its business affairs. In light of the evidence before the court, liquidation was the Van Dusens' only option, both statutorily and realistically. In fact, the debtors each testified that the business was not on firm financial ground, and Susan Van Dusen credibly stated that they considered bankruptcy their only option after the judgment against them and Rizzo.[4] Nevertheless, the debtors improperly continued the business. By paying only certain creditors, by depositing accounts receivable and payments for the Rizzo equipment and inventory in the Farm Bureau Credit Union account, and by choosing not to pay Allegra, the court finds that the debtors were not discharging Rizzo's liabilities in the manner required under Indiana Code § 23-1-46-2. The court determines, therefore, that the debtors have failed to abide by the statutory requirement to wind up its business. When the court considers the totality of the circumstances – the debtors' refusal to liquidate promptly, Rick Van Dusen's testimony that he did not want Allegra to collect its judgment, the debtors' undisclosed establishment of the Farm Bureau account, Rick Van Dusen's payments to selected creditors, and his transfer of Rizzo property to Susan Van Dusen's father for Paragon, a business virtually identical to Rizzo – it is clear that the debtors were using Rizzo for their own purposes and should be held personally liable for its debts. *See* Ind.Code § 23-1-26-3(b) (stating that a "shareholder may become personally liable by reason of the shareholder's own acts or conduct"); *cf. DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes, Inc.*, 384 F.3d 338, 346 (7th Cir. 2004) *(*recognizing a long-established principle of Indiana business law that "an officer or shareholder of a corporation can be held individually liable, without the need to pierce the corporate veil, if he personally participates in the fraud"); *Semenek v. Department of Revenue*,

[4] The court does not find credible Rick Van Dusen's testimony that he decided in December 2002 to file bankruptcy. It finds much more plausible Susan Van Dusen's testimony that they considered bankruptcy in the spring or summer of 2002 and, in light of their financial situation and the judgment against them, decided that bankruptcy was their only option.

166 B.R. 327 (N.D. Ill. 1994) (affirming the bankruptcy court's determination that the individual debtor was personally liable for tax obligations incurred during the period of administrative dissolution).

Two other factors weighed heavily in the court's determination that the debtors are liable for Rizzo debts. The first came from the debtors' bankruptcy filings. The debtors' Statement of Financial Affairs states that their business is a partnership. At trial, however, Rick Van Dusen insisted that Rizzo was a corporation, that the schedules contained a mistake, and that he did not know how it happened. The debtors' counsel called it an unfortunate mistake. In the view of the court, however, the debtors did not simply place a check-mark in the wrong box. Rick and Susan Van Dusen affirmatively stated that each of them held a 50% partnership interest and that they withdrew from the partnership in December 2002. *See* Statement of Fin'l Affairs at 9. Each one signed his and her name on April 15, 2003, swearing to the truth of the information therein. No amendment to the schedules was filed. The debtors were represented by able bankruptcy counsel. The court finds that the Statement of Financial Affairs is materially false. Whether the false information was entered intentionally or with reckless indifference to the truth, the court cannot excuse it. The debtors cannot claim inexperience as business owners and indeed they must bear the responsibility for their material misinformation. *See* 11 U.S.C. § 727(a)(4); *In re Rosenzweig*, 237 B.R. 453, 457 (Bankr. N.D. Ill. 1999) (finding that the debtor's material omissions and inaccuracies were fatal to the debtor's discharge).

The last factor persuading the court that the debtors were using Rizzo for their own purposes is their admitted use of the business checking account at Lake City Bank to make personal credit card payments and a payment to the Mercedes Benz dealer. Although Rick Van Dusen suggested that the payments were meant as "payroll"and as reimbursements for business purchases paid by their personal credit card, he presented no evidence to support that justification. In the view of the court, Rick Van Dusen's explanatory testimony is in no way helpful to him. The debtor's misuse of the Rizzo business account in such a casual manner further indicates his inability to separate personal and business finances. It is clear that the Van Dusens were unable to treat Rizzo as a business entity separate from themselves. The court concludes, therefore, that the acts alleged in the Allegra

complaint were acts of the debtors individually. Just as the arbitrator and district court judge found the Van Dusens jointly and severally liable on the debt to Allegra, this court also finds that they, as debtors in this court, are personally liable for the debts of Rizzo and of the Van Dusens.

The court determines that Allegra has met its burden of demonstrating that, within one year before the date that the Van Dusens filed bankruptcy, they transferred and concealed property in order to hinder Allegra from collecting the judgment debt. It therefore finds that the debtors' discharge is denied under 11 U.S.C. § 727(a)(2).

Because the court has denied the debtors' discharge of their debts, it will address only briefly Allegra's other allegation in its complaint that the judgment debt owed by the debtors to Allegra must be excepted from their discharge pursuant to 11 U.S.C. § 523(a)(6). Section 523(a)(6) of the Bankruptcy Code excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or the property of another entity." To fall within this exception, the debtor must have harmed the plaintiff and the injury must have been both willful and malicious. A "willful" injury is defined as a "deliberate or intentional injury, not merely a deliberate or intentional act that leads to an injury." *Kawaauhau v. Geiger,* 523 U.S. 57, 61, 118 S. Ct. 974, 977, 140 L.Ed.2d 90 (1998); *see also Berkson v. Gulevsky (In re Gulevsky),* 362 F.3d 961, 964 (7th Cir. 2004) (noting that § 523(a)(6) "does require proof that the injury was intended"). The Supreme Court made clear in *Geiger* that "debts arising from recklessly or negligently inflicted acts do not fall within the compass of § 523(a)(6)." *Geiger*, 523 U.S. at 64, 118 S. Ct. at 978. To demonstrate that the injury also was "malicious" under § 523(a)(6), this circuit requires that it be "in conscious disregard of one's duties or without just cause or excuse; it does not require ill will or a specific intent to do harm." *In re Thirtyacre,* 36 F.3d 697, 700 (7th Cir. 1994). "It is this knowledge of wrongdoing, not the wrongfulness of the debtor's actions, that is the key to malicious under § 523(a)(6)." *ABF, Inc. v. Russell (In re Russell),* 262 B.R. 449, 455 (Bankr. N.D. Ind. 2001). The plaintiff has the burden of proving by a preponderance of the evidence that its debt should be precluded from the debtors' discharge. *See Grogan v. Garner,* 498 U.S. 279, 289, 291, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991).

The court, having weighed the testimony and evidence in the record, determines that the plaintiff has satisfied the requirements of § 523(a)(6) under *Geiger* and Seventh Circuit law. It concludes that the debtors' injury to the plaintiff was willful and malicious. Rick Van Dusen testified that he "did not want them [Allegra] to collect all that money." He also testified that he chose not to pay Allegra, that he sold Rizzo's assets and used the proceeds to pay other creditors, and that he closed Rizzo and filed bankruptcy without paying the judgment debt. The court finds that the testimony of Rick Van Dusen is direct evidence of the actual intent of the debtors to harm Allegra. *See In re Rosenzweig*, 237 B.R. at 459 (finding that the debtor's candid admission that he knew what he was doing and what its effect upon the creditor would be was "precisely the intentional tortious conduct required by *Geiger* and is not merely negligent or reckless conduct"). The court further determines that the transfers of the debtors' Rizzo property to Paragon and of the accounts receivable to other creditors were acts made deliberately to place their assets beyond the reach of Allegra. *See In re Russell*, 262 B.R. at 455 (finding that the debtor's consciousness of wrongdoing was the key to the finding of malice under § 523(a)(6)). The court finds that Allegra has proven by a preponderance of the evidence that the debtors willfully (*i.e.*, deliberately or intentionally) and maliciously (*i.e.*, without just cause or excuse, in conscious disregard of one's duties) injured the plaintiff.

Conclusion

For the reasons presented above, the court grants the Complaint and Objection to Discharge filed by Allegra Network, LLC. The court sustains Allegra's objection to the discharge of the debtors Rick Alan Van Dusen and Susan Kay Van Dusen under 11 U.S.C. § 727(a)(2). The court also finds the judgment debt owed to Allegra to be nondischargeable under 11 U.S.C. § 523(a)(6).

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT